91-1576

(1)

Supreme Court, U.S.
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No.

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

LESTER LEVENE, SR. and SHIRLEY LEVENE
and
AMERICAN CASUALTY INSURANCE COMPANY
Petitioners

versus

PINTAIL ENTERPRISES, INC., LLOYDS OF LONDON,
and
SCOTTSDALE INSURANCE COMPANY
Respondents

FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE

1. Does a vessel owner owe any duty to its non-stevedore employee and/or passenger while conducting hazardous operations under the direction and control of the vessel owner even though part of the operations and the subsequent accident occur away from the vessel? The U.S. Fifth Circuit Court of Appeals' decision concludes that the negligence of a vessel owner under Section 905 (b) is limited to the vessel owner's negligence within the confines of the vessel. Its reasoning would also limit the vessel owner's negligence within the confines of the vessel even if a guest passenger is injured while disembarking from the vessel. This is contrary to the principles enunciated in Kermarec v. Compagnie Generale Transalantique, 358 U.S. 625, 70 S.Ct. 406 (1959) and its progeny and General Maritime Law. The U.S. Fifth Circuit Court of Appeals reaches this result even though the accident occurred in a work area under the direction and control of the vessel owner.

The U.S. Fifth Circuit Court of Appeals erroneously concluded that Scindia Steam Navigation Co. v De Los Santos, 451 U.S. 156 (1981,), requires this result.

It is respectfully submitted that as recognized by the U.S. Fifth Circuit Court of Appeals the issue presented is of significant importance and petitioners urge the review of this entire court.

CERTIFICATE OF INTERESTED PERSONS AND PARTIES

The undersigned, counsel of record for Plaintiffs-Appellants, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1.

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Plaintiffs - Petitioners

2.

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Defendant - Respondent

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9.

Lee Bernard
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Respectfully submitted,

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REFERENCE TO REPORTS OF OPINIONS DELIVERED IN THE CASE

Levene v. Pintail Enterprises, Inc., 943 F.2d 528 (5th Cir. 1991), decided on September 19, 1991.

Levene v. Pintail Enterprises, Inc., Unreported Opinion of Judge F. A. Little, February 8, 1990, United States District Court, Western District of Louisiana, Lafayette-Opelousas Division.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction pursuant to the provisions of 28 U.S.C. Section 1333.

This is an appeal from the United States Fifth Circuit Court of Appeals. The judgment sought to be reviewed was rendered on September 19, 1991, by the U.S. Fifth Circuit.

The Petition for Rehearing and Suggestion for Rehearing En Banc by Appellants was denied by the U.S. Fifth Circuit on October 25, 1991.

STATUTE

33 U.S.C. § 905 Exclusiveness of Liability

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act [33 USCS § 933], and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such actin shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of other remedies against the vessel except remedies available under this Act.

STATEMENT OF THE CASE

This is a cause of action for personal injuries sustained by Lester Levene while working as a longshoreman assigned to the M/V Sutton on February 7, 1986. Significantly, the captain had positioned the M/V Sutton against the barge where the accident occurred so as to allow Levene to travel across the barge to look for another inward barge to be transported by the M/V Sutton. Levene was directed by the captain of the vessel to leave the safe confines of the vessel and venture out into treacherous weather over a debris cluttered barge without proper illumination to search for the intended barge requested by the vessel owner. During the performance of his duties in the service of the ship, Mr. Levene was seriously injured on the barge.

A bench trial was conducted on November 20, 1989. The trial court relying on Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981), exonerated Pintail from liability under 33 U.S.C. Section 905 (b). A Panel of the U.S. Fifth Circuit Court of Appeals affirmed the district court's conclusion (though not the reasoning) on September 19, 1991. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the U.S. Fifth Circuit on October 25, 1991.

The court of first instance had jurisdiction pursuant to 28 U.S.C. Section 1333. A claim by plaintiffs was made against defendants pursuant to 33 U.S.C. Section 905 (b).

On February 7, 1986, Lester Levene was employed by Pintail Enterprises, Inc. primarily as a heavy equipment operator. The tugboat on which he was working, the M/V Sutton, was operated by Pintail Enterprises, Inc. pursuant to a verbal bareboat charter agreement. Therefore, it is undisputed that Pintail was the owner pro hac vice of the vessel.

The M/V Sutton was manned by a captain, one designated deckhand and Mr. Levene. In essence, Mr. Levene served as a borrowed deckhand at the time of the accident subject to the complete authority and control of the vessel owner through its captain.

Prior to the accident, Levene's duties included assisting

the captain and performing traditional deckhand duties such as line-handling operations.

Immediately before the accident the crew had been working in excess of eighteen (18) hours. The vessel owner had instructed the vessel to search and pick up a barge as the BB-243 located at the Broussard Brothers docking area along the Intracoastal Waterway. As between Pintail and Broussard Brothers it was customary for Pintail to locate the barge leased from the Broussard Brothers' dock area.

The crew had already been working in excess of eighteen (18) hours when the M/V Sutton reached the docking facility. It was late at night, raining very hard, the wind was blowing and there was thunder and lightning.

Despite the inclement weather, the captain decided to continue the search for the unmanned barge. It was the decision of the vessel owner alone to decide whether or not to continue the vessel operations that evening in light of the dangerous conditions.

The captain positioned the bow of the vessel at a midpoint on a barge that was stacked alongside an inland barge. This was done to allow the deckhand and Mr. Levene ingress and egress from the outward barge to the inward barge to determine if the inward barge was actually the one that was chartered by the vessel owner.

The barge that was adjacent to the bow of the M/V Sutton had been loaded two (2) days previously by certain members of the Pintail, but not Mr. Levene. Subsequently, the captain was aware that this particular barge was cluttered with debris and equipment prior to the incident.

At the time of the accident the designated deckhand and Mr. Levene were instructed to go to the mooring bits on the opposite ends of the outward barge and untie the lines in order to release this barge from the inward barge.

The M/V Sutton was equipped with two (2) spotlights, but only one spotlight was operational. The captain aimed the only operational spotlight directly in the middle of the barge to assist the deckhand and Mr. Levene in the line-handling operation. Due to the position of the barge and vessel, the lighting was adequate in the middle of the barge, but not on the extreme right and left ends of the barge where

the mooring bits were located and where Mr. Levene needed to walk.

Despite the continued rain and poor visibility, the captain instructed the Pintail employees to proceed with the line-handling operation. Levene left the Sutton intending to reach the mooring bit in the far right corner of the barge. However, he was forced to walk toward the near right corner of the barge because several obstructions on the barge prevented him from proceeding directly to his intended destination. Levene was injured when he slipped and fell on some slippery substance while attempting to make his way in the dark towards the mooring bit.

The fact that the barge was cluttered with oilfield equipment and debris was known and obvious to the captain. The captain also was well aware of the poor weather conditions, the inadequate lighting and as agent of the vessel owner he decided to extend the operations of the vessel under these dangerous conditions.

In summary, the vessel owner was not only aware of the dangerous weather and conditions on the adjacent barge, but forged ahead with only one spotlight operational which could not provide proper illumination to the two (2) Pintail employees working on opposite ends of the barge. Neither the deckhand nor Mr. Levene were provided with proper illumination in an effort to safely negotiate on the barge in an effort to accomplish the mission mandated by the vessel.

It is clear that although Mr. Levene's accident happened adjacent to the M/V Sutton, the negligence stemmed from the negligence of the vessel owner in operating a defective vessel (only one operational spotlight), failing to provide proper illumination from the vessel to the unlit barge and continuing operations under treacherous circumstances.

ARGUMENT

The following hypothetical using the same factual backdrop illustrates the conflict created by the U.S. Fifth Circuit's decision in the case sub-judice.

Hypothetical:

(1) Let's assume three (3) maritime workers and/or guest passengers are aboard the M/V Sutton.

(2) Further assume that the captain of the vessel instructs all three (3) persons that despite the treacherous weather conditions and inadequate lighting the passengers are to make their way from the vessel to an adjoining barge that is unreasonably dangerous.

(3) Maritime worker and/or guest passenger (A), after leaving the wheelhouse, is injured while making his way along the vessel because he cannot see a dangerous condition on the deck of the vessel. Does maritime worker and/or guest passenger (A) have a valid cause of action under Section 905 (b) and General Maritime Law, respectively? Clearly the answer is a resounding "yes"! See Masinter v. Tenneco Oil Company, 867 F.2d 892 (5th Cir. 1989) and Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406 (1959).

> " . . . it is beyond peradventure that Marlin owed to Masinter a duty of care to take precautions necessary to avoid exposing Masinter to the hazardous conditions created by the placement of the stairway." (867 F.2d at p. 897)

A vessel owner owes a duty of exercising reasonable care to all those who are on board for purposes not inimical to its legitimate interest. See Kermarec, supra.

(4) Let us assume that maritime worker and/or guest passenger (B) alongside maritime worker and/or guest passenger (A) safely negotiates the deck of the vessel but is injured when he slips and falls on a board serving as a gangplank between the vessel and the barge. Does maritime worker and/or guest passenger (B) have a valid cause of action under Section 905 (b) and General Maritime Law, respectively, against the vessel owner for failing to provide

safe ingress and egress? The answer is a resounding "yes"! See Gay v. Barge 266, 915 F.2d 1007 (5th Cir. 1990) and Counts v. Lafayette Crewboats, Inc., 622 F.Supp. 299, 301 (D.C. La. 1983).

(5) Let us further assume that maritime worker and/or guest passenger (C) (Lester Levene) is fortunate to negotiate the hazardous vessel deck, even more fortunate to negotiate the wooden gangplank, but is less fortunate in trying to make his way over the barge as directed to do by the vessel owner. Does maritime worker and/or guest passenger (C) (Lester Levene) have a valid cause of action under Section 905 (b) and General Maritime Law, respectively? The answer should be "yes" because as in Masinter and in Gay the vessel owner is liable for providing a safe work place under the vessel owner's control.

The vessel owner must provide a passenger a reasonably safe means of ingress and egress from the vessel, proper gangways, landing places, and personnel assistance. See Tittle v. Aldacosta, 544 F.2d 752 (5th Cir. 1977) and Arthur v. Flota Merconte Gran Centro Americana, S.A., 487 F.2d 561 (5th Cir. 1974).

This duty also includes situations when a passenger is trying to disembark from the vessel onto the barge and is injured on the barge. See Marshall v. Westfal-Larsen & Co., 259 F.2d 575 (9th Cir. 1958).

Taking the hypothetical one step further, let us assume that another maritime worker and/or guest passenger (we will call him (D)) in order to return to the vessel must use a swing rope adjacent to a platform in order to swing over the barge back to the M/V Sutton. Unfortunately, maritime worker and/or guest passenger (D) does not quite make it to a safe area of the vessel's deck and is injured. Does maritime worker and/or guest passenger (D) have a valid cause of action under Section 905 (b) and General Maritime Law, respectively? The answer is "yes"! See Musial v. A & A Boats, Inc., 696 F.2d 1149 (5th Cir. 1983) and Martin v. Walk, Haydel & Associates, Inc., 742 F.2d 246 (5th Cir. 1984).

It is submitted that the legal conclusion of the U.S. Fifth Circuit is completely at odds with established precedent of the U.S. Supreme Court and conflicts with the Ninth Circuit's

decision in Marshall, supra. This Honorable Court should grant the Writ for Certiorari to resolve the conflict between the Ninth Circuit and Fifth Circuit regarding whether a vessel owner owes a duty to passengers and/or maritime workers who are actually injured outside the confines of the vessel.

ANALYSIS

Under the facts and circumstances of this case, it is submitted that the appropriate inquiry is as follows:

(1) Does the Scindia analysis apply to this 905(b) action in lieu of the duty to exercise reasonable care under the circumstances of each case as set forth in Kermarec v. Compagnie Generale Transatlantique, 79 S.Ct. 406 (1959) and Federal Marine Terminal, Inc. v. Burnside Shipping, Ltd., 89 S.Ct. 1144 (1969)?

(2) If the Scindia analysis is applicable; did the U.S. Fifth Circuit decision correctly analyze this case in light of the legal principles established by this Honorable Court and other circuits?

Petitioners submit the analysis should begin with a review of the relevant statutes. Section 905(b) reads as follows:

> "In the event of injury to a person covered under this act caused by the negligence of a vessel . . . If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . ."

It is undisputed under that facts of this case that the dual capacity doctrine is applicable and that Pintail is the vessel owner for purposes of Section 905(b). It is also clear that the statute does not define what is "negligence of a vessel." This section does place a limitation on recovery if the person employed by the vessel is providing stevedoring services, then no action will be permitted if the negligence resulted from those also engaged in providing stevedoring services. In fact, throughout the appellate history of this case, Pintail strenuously argued that the stevedoring limitation set forth under Section 905(b) was applicable arguing that the negligence of the captain was not vessel negligence but employer or stevedore negligence. Pintail also strenuously argued that Levene was acting as a stevedore. The Fifth Circuit expressed doubt that Levene was acting as a stevedore, though it concluded that it need not decide this question. See

though it concluded that it need not decide this question. See Page 9 of the Fifth Circuit decision. However, the Fifth Circuit never analyzed the actions of the captain as agent of the vessel owner as to whether his negligence was vessel negligence versus employer negligence. The only finding that could be reached was that the captain was acting as master of the vessel and not acting as a stevedore or employer. The Fifth Circuit simply concluded that the vessel owner had no obligation to Mr. Levene under Section 905 (b) because this accident occurred away from the vessel.

Under 33 U.S.C. Section 902 (21) the term "vessel" means any vessel upon which or in connection with which any person entitled to benefit under this act suffers injury or death or arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charterer or bareboat charter, master, officer or crew member. Clearly, the act does not require physical injury upon the vessel for recovery under Section 905 (b). This has always been the rule under General Maritime Law for guest passengers. There is no requirement that physical injury occur upon the vessel for recovery under General Maritime Law as against the vessel owner.

Does the jurisprudence of the Fifth Circuit limit recovery to injuries only occurring on the owner's vessel? Vessel negligence can take many forms. Consider Masinter, Helaire, Musial, Scindia, etc. Vessel negligence can be of omission or commission arising out of a defective vessel, an unsafe appurtenance, or an imprudent direction emanating from the vessel's owner or agent. Prior to the Fifth Circuit decision, no Court has EVER concluded that a vessel owner has no obligation to a party simply because the accident occurred outside the confines of the vessel when, in fact, the vessel was the precipitating cause of the accident.

Suppose that while Lester Levene was on the adjacent barge, the captain negligently rammed the barge on which Levene was standing with the tug and knocked Mr. Levene down into the water. Under the reasoning set forth by the U.S. Fifth Circuit, Mr. Levene would have no cause of action against the vessel owner under Section 905 (b) or under General Maritime Law. Is there any legal distinction in the

captain bumping the barge with the vessel knocking down Mr. Levene versus directing him onto the adjacent barge in treacherous weather without proper illumination? This type of action has always been considered to be vessel negligence. See Masinter, Musial, supra and Pichoff v. Bisso Towboat Co., Inc., 748 F.2d 300 (5th Cir. 1984).

The Fifth Circuit did note that it does not agree with the district court's analysis. The district court likened Pintail's action in turning over the tug after inspecting it and finding no hidden hazards to a ship owner turning over a ship to a stevedore. "Once the line-handling operation began, Pintail was under no duty to supervise the work, especially where it took place on another ship." The district court also held that Pintail did not breach its duty under Scindia to intervene because "the scope of this duty is limited to the confines of a stevedoring operation, which typically encompasses the work area on the vessel to which a stevedore is assigned." The Fifth Circuit disagreed stating:

> "While we disagree with the district court's characterization of any Scindia duty as applying only to stevedoring operations, we may affirm the judgment even though the district court may have arrived there through a method of reasoning that we would not adopt."

It is submitted that the only way to reach the result of the Fifth Circuit is to determine that (1) the actions of the captain cannot be construed as vessel negligence; or (2) the vessel owner simply owes no obligation beyond the parameters of the vessel.

Let us closely look at Page 13 of the Fifth Circuit's decision.

> "Levene essentially argues that, because he was performing non-stevedoring operations on a separate barge, Pintail's duties extended beyond the Scindia duties of ensuring the safety of the Sutton, preventing unreasonable hazards once the operation began, and intervening with respect to obvious dangers.

> He asked us to fashion a standard of care in which a vessel owner such as Pintail must protect him from unreasonably dangerous conditions on any vessel he happens to board while carrying out his duties for his employer/ vessel owner. We think such a rule is foreclosed by the Supreme Court's decision in Scindia and our case is recognizing that Scindia alone applies to substantive negligent standards in an action under Section 905 (b). We cannot find in Scindia any mandate for extending the duty of a ship owner to protection against hazards on another ship."

Petitioners agree that a vessel owner should not be responsible per se for the hazards on an adjoining vessel. However, the vessel owner should be responsible for sending out workers in the employ of the ship to work in hazardous conditions with a defective spotlight providing improper illumination and knowing that the worker will encounter a hazardous and slippery deck on the adjacent barge cluttered with debris.

The panel apparently felt their conclusion was mandated by Scindia.

> "Absent alteration by the Supreme Court of the fairly detailed duties, it has interpreted Section 905(b) as imposing, we decline to fashion a general standard of 'reasonable care' that would require a ship owner to protect against any and all hazards a longshoreman might encounter in the course of his work. Other than the duty to protect against hazards under the control of the ship (which we consider a narrow exception discussed below), we do not think Scindia imposes any duty on a ship owner to protect against hazards arising on a separate ship."

Returning to the hypothetical situation, let us suppose that the vessel drops off Levene on a barge obviously unseaworthy and that barge sinks injuring or drowning Mr. Levene. Under the Fifth Circuit decision there would be no cause of action under Section 905(b) or under the General

Maritime Law.

The Fifth Circuit decision does recognize that Pintail may be held liable for injury caused by hazards "under control of the tug." In Helaire, it was stated that:

> "The owner has a duty to avoid exposing longshoreman to harm 'from hazards under the act or control of the vessel.' Id. at 1036, citing Scindia, 451 U.S. at 167; see also Masinter. However, we do not view the fleeting contact between Pintail and the BB-242 as a kind of control that could result in a finding of liability."

Petitioners certainly acknowledge that the M/V Sutton had fleeting contact with the adjacent barge. However, it is respectfully submitted the Fifth Circuit erroneously equates control over the adjoining vessel with "hazards under the control of the tug." Simply stated, Pintail had complete control and authority (which it exercised) to determine if the work should have been undertaken and the method and manner of illuminating the workplace especially when Pintail knew of the dangers associated with the barge.

Furthermore, the Fifth Circuit's decision incorrectly concluded that there was no evidence that Pintail had any responsibility for the condition of the deck of the barge. There was direct testimony that only two (2) days earlier Pintail had littered the barge with equipment. Whether or not Pintail had any responsibility for the condition of the barge deck is immaterial because Pintail was directly responsible for ordering the crew to proceed under the hazardous conditions!

It is respectfully submitted that the U. S. Fifth Circuit either erroneously concluded that the Scindia analysis is applicable or at the very least has misinterpreted the Scindia doctrine.

Petitioners submit it is legally appropriate to analyze closely whether or not the Scindia analysis is applicable. In Kermarec, supra, the U.S. Supreme Court stated the following:

> "It is the subtle principle of maritime law that a ship owner owes a duty to exercise reasonable care to those lawfully aboard the vessel who

> are not members of the crew . . ." (79 S.Ct. at P. 409)
>
> "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to its legitimate interest the duty of exercising reasonable care under the circumstances of each case." (Emphasis added) (79 S.Ct. at P. 410)

Likewise, see Federal Marine Terminal, Inc. v. Burnside Ship. Co., Ltd., 89 S.Ct 1144 (1969) wherein the U.S. Supreme Court held that a vessel owner owes a duty of due care to not only the stevedoring company, but to others lawfully on the ship. In Burnside, the plaintiff claimed that the vessel owner was negligent for failing to properly guard a deep tank opening, failure to provide clear passageway, and a failure to provide adequate lighting, etc., said allegations similar to those asserted in the instant case.

The highest court confirmed that reasonable care approach in Scindia.

> ". . . this court reversed, preferring to adopt a single duty of 'exercising reasonable care under the circumstances of each case,' rather than to incorporate in the maritime law the complexities of the common law of invitee and licensee. (Citation submitted.) . . . the Kermarec standard was reaffirmed in Federal Marine Terminal v. Burnside Ship. Co., Ltd., (citations omitted), a case involving a suit by a stevedore against a ship owner. We have no quarrel with this standard. INEVITABLY, HOWEVER, THE RULE WILL UNDERGO REFINEMENT AS IT IS APPLIED TO VARIOUS CATEGORIES OF CASES . . ." (Emphasis added) (101 S.Ct. at p. 1620, n.10)

The Supreme Court recognized that a "reasonable care" standard would have the necessary flexibility given the particular circumstances of a case.

The Fifth Circuit decision not only misinterprets Scindia but refuses to consider the Kermarec rule and the Scindia "reasonable care standard."

Gilmore & Black, "The Law on Admiralty", Second Edition, succinctly state the issue the Fifth Circuit overlooks.

> "Kermarec may reasonably be cited to the proposition that the same standard of care is owed to all persons who are legitimately on the ship -- crew members, passengers, longshoreman, repairmen, even those who at common law would have been described as "mere licensees." For present purposes we may leave the passengers and guests to fight their own battles. The longshoreman and repairmen are on the ship in furtherance of the shipowner's commercial interests. They are, as the Supreme Court liked to put it during the Sieracki period, doing the ship's work -- arguably, work that at our time was performed by the crew -- they are unquestionably subject to the ship's hazards. As Justice Black, speaking of a repairman, wrote in Pope & Talbot, Inc. v. Hawn:
>
> > 'His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under the law.'" Id. at 453-454.

The Fifth Circuit's holding is contrary to many of its own decisions interpreting a vessel owner's liability under 905(b).

In Musial v. A & A Boats, Inc., 696 F.2d 1149 (5th Cir. 1983), the Fifth Circuit refused to apply the Scindia analysis in evaluating the vessel owner's negligence in the context of the use of a swing rope from an oil platform to the vessel.

See also Pichoff v. Bisso Towboat Co., Inc., 748 F.2d 300 (5th Cir. 1984). The trial court made the following conclusions:

> "Bisso was negligent in failing to provide Pichoff with adequate lighting . . . Had Bisso provided a drop light, Pichoff would likely have 'not injured himself.' It was foreseeable that Pichoff

> would need a drop light to provide greater illumination to free his hands while he inspected the compartment. Bisso was negligent in ordering Pichoff to conduct a hurried inspection without one."

The Fifth Circuit's decision seems to suggest that the decision of Castorina v. Lykes Bros. S.S. Co., 758 F.2d 1025 (5th Cir. 1985) somehow limits Pichoff"... we think our later decision in Castorina does not leave any room for the broad-based duty Levene urges."

Pichoff is still good law in the Fifth Circuit and has been cited with approval in Gay v. Barge 266, supra.

Petitioners have no quarrel with Castorina which concerns the duty of the vessel owner for the latent defects in the vessel's cargo. Petitioners firmly believe this was a case correctly decided properly under the Scindia analysis. However, the instant case like Pichoff is not subject to the Scindia analysis, but the reasonable care standard that the Supreme Court has recognized and followed in this Circuit. Kermarec, Federal Marine Terminal, Inc., Pichoff, Musial.

Petitioners argued that under the circumstances of this case, especially considering that Levene was actually performing traditional seaman duties, the standard of care owed the vessel owner under the Scindia "reasonable care approach" should be akin to the duty owed under the Jones Act. This makes sense because a co-employee deckhand performing the exact duties of Levene was a Jones Act seaman. A Jones Act employer through its captain could certainly be considered negligent and responsible to the deckhand under the Jones Act even though the accident occurred away from the vessel. Thus, in the context of this particular case, it is submitted that the vessel owner using a "reasonable care" approach owed a duty not to send Levene out on the adjacent barge given the poor weather conditions, the lack of illumination and the hazards associated with the barge itself, all known and recognized by the vessel owner. Such a rule would bring uniformity in the General Maritime Law for workers exposed to identical risks and dangers. See Pope & Talbot, Inc. v. Hawn, 74 S.Ct. 202 (1953).

CONCLUSION

Both the Supreme Court and the Fifth Circuit have stressed the need for uniformity in our maritime law. It is respectfully submitted the Fifth Circuit decision does considerable violence to the "reasonable care approach" adopted by this Court with respect to the duties owed by vessel owners to those lawfully aboard the vessel. Federal Marine Terminal, Inc., Kermarec and Pope, supra.

Petitioners urge that a reasonable care standard under general maritime law principles is a standard that has been adopted by the highest court of this land. Kermarec, Federal Marine Terminal, Inc., supra and applicable to this case.

Whether or not the Scindia analysis is appropriate, it is absolutely clear that the vessel owner was responsible for jettisoning Mr. Levene into the hazards that led to his accident. This vessel negligence should be addressed and remedied by the entirety of this Honorable Court under principles that promote uniformity, reasonableness and flexibility.

Respectfully submitted,
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APPENDIX

1. U. S. Fifth Circuit Court of Appeals Denial on Petition for Rehearing and Suggestion for Rehearing En Banc.

2. Levene v. Pintail Enterprises, Inc., 943 F.2d 528 (5th Cir. 1991), decided on September 19, 1991.

3. Levene v. Pintail Enterprises, Inc., Unreported Opinion of Judge F. A. Little, February 8, 1990, United States District Court, Western District of Louisiana, Lafayette-Opelousas Division.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4155

LESTER LEVENE, SR. and
SHIRLEY LEVENE,

Plaintiffs - Appellants,

and

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA,

Intervenor - Appellant,

versus

PINTAIL ENTERPRISES, INC., and
LLOYDS OF LONDON, AND
SCOTTSDALE INSURANCE CO.,

Defendants - Appellees.

— — — — — — — — — — — —

Appeal from the United States District Court for the
Western District of Louisiana

— — — — — — — — — — — —

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., 198__, _____ F.2d _____)

(October 25, 1991)

Before WISDOM, KING and BARKSDALE, Circuit Judges.

PER CARIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Judge Smith did not participate in the consideration of the suggestion for rehearing en banc.

Lester LEVENE, Sr. and Shirley Levene, Plaintiffs-Appellants,

American Casualty Company of Reading, Pennsylvania, Intervenor-Appellant,

v.

PINTAIL ENTERPRISES, INC., Lloyds of London and Scottsdale Insurance Company, Defendants-Appellees.

No. 90-4155.

United States Court of Appeals,
Fifth Circuit.

Sept. 19, 1991.

Nonstevedore employed aboard tugboat sued employer under Longshore and Harbor Workers' Compensation Act (LHWCA), alleging that employee in linehandling operation on barge owned by another, whereby tugboat moved barge in order to free another barge. The United States District Court for the Western District of Louisiana, F. A. Little, Jr., J., dismissed action. Employee appealed. The Court of Appeals, King, Circuit Judge, held that: (1) employer had immunity under LHWCA in its capacity as employer, regardless of whether employee was performing stevedoring operations; (2) vessel owner does not owe duties other than those enumerated in Supreme Court's Scindia decision to its nonstevedore employee conducting operations on separate vessel; and (3) employer did not have constructive control over work area of barge.

Affirmed.

1. Shipping — 84(1)

To recover under LHWCA, worker must be engaged in maritime employment and be injured on maritime situs. Longshore and Harbor Workers' Compensation Act, §§ 4, 33 U.S.C.A. §§ 904, 905(b).

2. Workers' Compensation — 2162

Under LHWCA, when employer acts in dual capacity as vessel owner, entity retains its immunity for acts taken in its capacity as employer, but may still be sued "qua vessel" for acts of vessel negligence. Longshore and Harbor Workers' Compensation Act, §§ 4, 5(a,b), 33 U.S.C.A. §§ 904, 905(a,b).

3. Workers' Compensation — 2085

Availability of tort remedy for vessel negligence is limited exception to general structure of LHWCA, which, like stare workers' compensation schemes, generally replaces negligence causes of action against employers with system of predetermined, standardized benefits. Longshore and Harbor Workers' Compensation Act, §§ 4, 5(a,b), 33 U.S.C.A. §§ 904, 905(a,b).

4. Workers' Compensation — 2085

Under LHWCA, employer was immune from liability for vessel captain's decision to continue working despite inclement weather, and his alleged failures to provide adequate illumination and to provide safe workplace, resulting in injury to employee on barge owned by another, regardless of whether employee was acting as stevedore or any other type of harbor worker. Longshore and Harbor Workers' Compensation Act, § 5(a), 33 U.S.C.A. § 905(a).

5. Shipping — 84(4)

Longshore and Harbor Workers' Compensation Act (LHWCA) section barring suits against owner-employers for injuries caused by fellow servants has nothing to do with circumstances under which employer retains immunity; it simply bars suits for vessel negligence against vessel owner when injury was caused by negligence of stevedore's fellow servant. Longshore and Harbor Workers' Compensation

Act, § 5(b), 33 U.S.C.A. § 905(b).

6. Shipping — 84(1)

Under LHWCA, vessel owner owes no duties other than those enumerated in Supreme Courts' Scindia decision to its nonstevedore employee conducting operations on separate vessel. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

7. Shipping — 84(2)

Before stevedoring operations begin, vessel owner must warn stevedore of hidden dangers that could not be discovered by exercise of ordinary care. Longshore and Harbor Workers' Compensation Act, § 5(b) 33 U.S.C.A. § 905(b).

8. Federal Courts — 761

Court of Appeals may affirm district court's judgement even though district court many have arrived there through method of reasoning that Court of Appeals would not adopt.

9. Workers' Compensation — 2085

Longshore and Harbor Workers Compensation Act (LHWCA) foreclosed vessel owner's liability in negligence to its employee injured in barge owned by another; vessel owner had contact with barge only for short time and only by chance as part of operation to free another barge, and thus, vessel owner did not have constructive control over work area of barge and was not responsible for condition of its deck. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

Appeals from the United States District Court for the Western District of Louisiana.

Before WISDOM, KING, and BARKSDALE, Circuit Judges.

KING, Circuit Judge:

The principal question in this appeal is whether a vessel owner owes any duties other than those enumerated in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), to its non-stevedore employee conducting operations on a separate vessel. The district court, applying the Scindia standards, found that the vessel owner breached no duty to its employee, and dismissed the employee's claims. We agree with the district court's conclusion that Scindia provides the proper framework for analysis in this case, and accordingly affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

The district court found the following facts, which we accept as not clearly erroneous. Kendall v. Block, 821 F.2d 1142, 1146 (5th Cir.1987); O'Malley v. United States Fidelity & Guaranty Co., 776 F.2d 494, 497 (5th Cir.1985).

LEVENE v. Pintail ENTERPRISES, INC.

Lester Levene was employed by Pintail Enterprises primarily as a heavy equipment operator, but he occasionally performed other work for Pintail as needed. On the morning of the February 7, 1986, Captain Preston Hebert, a Pintail employee, inspected the M/V SUTTON, a tugboat chartered and operated by Pintail, and determined that the SUTTON was fit for its intended voyage. Levene, Hebert and Kevin Warner, another Pintail employee, boarded the SUTTON and proceeded to a drilling site, where they performed their daily work. Hebert then was instructed to proceed to Broussard Bros., a barge facility in Intercostal City, Louisiana, to pick up a barge for the next day's work.

Enroute, night fell and rain began to fall. The crew was to pick up a barge, known as the BB-243, but they found another barge, the BB-242, blocking their access.[1] It was thus necessary to untie the BB-242 and move it out of the way.

Captain Hebert positioned the SUTTON's bow against the side of the BB-242 and aimed the SUTTON's spotlight down the middle of the barge. He then sent Levene and Warner onto the BB-242 and instructed them to untie the lines from the mooring bits at opposite ends of the barge. By this time the rain was steady, wind blowing, and there was thunder and lighting.

Because of the positions of the SUTTON and the BB-242, the spotlight provided adequate illumination down the middle of the barge, but the light tapered off and became dim at the ends of the barge where the mooring bits were located. Despite the rain and poor visibility, Levene and Warner proceeded to carry out Captain Hebert's instructions. They could see a variety of objects on the deck of the BB-242, including oilfield equipment and scrap material. Levene intended to go to the mooring bit at the far right corner, but the obstructions forced him to walk initially toward the near right bit. He did this despite the presence of scrap material and grease in his path. Halfway to the mooring bit, Levene slipped and injured his knee. He continued with the linehandling operation, and then returned to the SUTTON and told Hebert about the accident.

Levene filed suit against Pintail, Broussard Bros. (owner of the barge) and Lee Bernard (owner of the SUTTON)[2] under the Jones Act, 46 U.S.App. § 688, and the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 et seq. (LHWCA), alleging that Pintail, Bernard and Broussard

1. Both barges were flatbed barges approximately 120 feet long and 30 feet wide, with decks three feet above the water line.

2. Bernard leased the SUTTON to Pintail under an oral bareboat charter agreement. The parties do not dispute that Pintail may be held liable as owner of the SUTTON. For the sake of simplicity, we refer throughout to Pintail as a vessel owner.

negligently caused the injury he sustained in the BB-242. The district court granted the defendants summary judgment on the Jones Act claim and conducted a bench trial on the LHWCA claim against Pintail.[3] He amended his complaint to add certain of the defendants' insurers.[4] The court agreed with Pintail that Levene's allegations of negligence-including Pintail's failure properly to illuminate the work area on the BB-242, its failure to clear a path or warn Levene of hazards on the barge, and its insistence on working in bad weather - constituted the potential negligence of Levene's employer. The court held that Pintail's statutory immunity from tort suit for negligent acts taken in its capacity as Levene's employer barred recovery for these acts. The court concluded that there were no reasonably dangerous conditions aboard the SUTTON of which Levene was not warned, and that Pintail came under no duty to intervene to prevent any injury during the line-handling operation. The court entered judgement dismissing all of the Levene's claims, and Levene filed this appeal.

II. ANALYSIS

[1] To recover under the LHWCA, a worker must be engaged in maritime employment and be injured on a maritime situs. Northeast Marine Terminal v. Caputo, 432 U.S. 249, 255, 97 S. Ct. 2348, 2353, 53 L.Ed.2d 320 (1977). The LHWCA provides for two different types of liability. Under § 904, a covered worker may receive compensation benefits from his employer without regard to fault. Under § 904(b), the same worker may pursue a tort action against the owner of a vessel for acts of vessel negligence. Thus, for example, a longshoreman working for an independent stevedore may recover benefits from his employer and may pursue

3. Levene settled his claims against Broussard Bros., the owner of the barge, prior to trial. He has not appealed the dismissal of the Jones Act Claim.

4. Because we affirm the judgement, we need not address the coverage issues raised on appeal by the insurers.

a separate action in tort against the owner of the vessel on which he was injured. He may not, however, sue his employer in tort. Section 905(a) affords employers full immunity from tort suits by providing that compensation benefits "shall be exclusive and in place of all other liability of such employer to the employee..."

[2,3] Frequently, however, a longshoreman is injured on a vessel owned by his employer. When an employer acts in a dual capacity as vessel owner, the entity retains its immunity for acts taken in its capacity as an employer, but may still be sued "qua vessel" for acts of vessel negligence. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 532, 103 S.Ct. 2541, 2548, 76 L.Ed.2d 768 (1983); Kerr-McGee Corp v. Ma-Ju Marine Serv., Inc., 830 F.2d. 1332, 1339 (5th Cir.1987). The difference between the capacities in which an employer may act is extremely important. The availability of a tort remedy for vessel negligence is a limited exception to the general structure of the LHWCA,[5] which, like state workers compensation schemes, generally, replaces negligence causes of action against employers with a system of predetermined, standardized benefits. Therefore, we have held that an employer that also functions as a vessel owner is liable for vessel negligence under the same negligence standards applicable to an independent vessel owner. Castorina v. Lykes Bros. S.S. Co., 758 F.2d. 1025, 1033 (5th Cir.), cert. denied, 474 U.S. 846, 106 S.Ct. 137, 88 L.Ed.@d 113 (1985) ("duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel") The LHWCA absolutely bars suit for all other acts taken in the capacity as the employer of the injured worker.

This case is like Jones & Laughlin in that Pintail occupied a dual capacity as Levene's employer and vessel owner. Levene contends, however, that Pintail as employer is not

5. See, e.g., Fruge v. Penrod Drilling Co., 918 F.2d 1163, 1169 (5th Cir.1990) (describing Scindia as setting forth "broad pronouncements of immunity on the part of the vessel owner"); Masinter v. Tenneco Oil Co., 867 .2d 892, 896 .2d 191 5th (Cir.1991).

immune from an action sounding in negligence because the principles of employer immunity under the LHWCA apply only to injured stevedores. We reject this argument as contrary to the plain language of the LHWCA and the consistent holdings of our cases. A better argument, and, we think the one that presents the important question in this appeal, is that Pintail had a duty broader than that set forth in Scindia to protect Levene from injury on a barge separate from the Pintail vessel.

A. Applicability of Employer Immunity

[4] Levene first argues that Pintail has no immunity in its capacity as employer because Levene and Captain Hebert were not performing stevedoring operations. He contends that "Pintail does not enjoy statutory immunity if its negligence does not arise out of 'stevedoring services.' To enjoy the statutory immunity, Pintail must demonstrate that (1) the captain was performing stevedoring services and (2) Lester Levene was performing stevedoring services." (emphasis in original). Levene appears to derive this argument from the following sentence in § 905(b), the section which provides for an action against a vessel for vessel negligence:

> If [an injured worker] was employed by the vessel to provide stevedoring services, no [negligence action against the vessel] shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.

33 U.S.C. § 905(b). Having concluded that Pintail is not immune from liability for acts of negligence in its capacity as employer, Levene contends that Captain Herbert's decision to continue working despite the weather, his failure to provide adequate illumination, and his failure to provide a safe place to work should result in a finding that Pintail is liable for his injury.

We think Levene misconstrues both § 905(b) and the structure of employer immunity. Section 905(b) is concerned solely with granting an injured worker a tort remedy against a vessel negligence, e.g., Masinter v. Tenneco Oil Co., 867 F.2d 892, 896(5th Cir.1989); Teply v. Mobil Oil Corp., 859

F.2d. 375, 377(5th Cir.1988), and has nothing to say about the general immunity granted to an employer. That task is performed by § 904 (compensation based on predetermined benefit schedules) "shall be exclusive and in place of all other liability of [an] employer to the employee. . . ."

[5] In Jones & Laughlin, the Court took the sentence quoted above from § 905(b) as evidence that Congress intended to preserve the action for vessel negligence when the employer is also the vessel owner: why, the Court asked, would Congress have inserted this sentence barring suits against owner- employers for injuries caused by fellow servants if it had intended to bar all suits against employer owners in § 905(a). Jones & Laughlin, 462 U.S. at 530-31, 103 S.Ct. at 2547. It is evident that this sentence has nothing to do with the circumstances under which an employer retains immunity. It simply bars suits for vessel negligence of a stevedore's fellow servant. See Cavalier v. T. Smith & Son, Inc., 668 F.2d. 861 (5th Cir.), cert. denied, 495 U.S. 860, 103 S.Ct. 134, 74 L.Ed.2d. 115 (1982).

The relevant section of the LHWCA for purposes of Levene's argument is § 905(a). As noted above, that section provides tort immunity for all negligent acts taken in the capacity as employer, and leaves an injured worker with LHWCA benefits as his exclusive remedy against his employer. Moore v. Phillips Petroleum Co., 912 F.2d 789, 791 (5th Cir.1990); Foreman v. Exxon Corp., 770 F.2d. 490, 494 (5th Cir.1985). Nothing in § 905(a) or Jones & Laughlin suggests that workers are injured on vessels owned by their employers, the statute grants immunity only if the worker was performing stevedoring operations. Pintail argues strenuously that Levene was performing stevedoring operations and that therefore Pintail retains its immunity. While we doubt that Levene was acting as a stevedore, we need not decide this question, for it is cleat that so long as Levene was a covered worker under the LHWCA- whether he was a stevedore of any other type of harbor worker-Pintail as employer enjoys full immunity from suit. We have on numerous occasions precluded recovery against an employer

by injured workers performing non-stevedoring activities, e.g. Moore, 912 F.2d at 791; Johnson v. Odeco Oil & Gas Co., 864 F.2d 40, 44(5th Cir.1989); Robin v. Sun Oil Co., 584 F.2d 54, 556 (5th Cir.1977), and we follow this rule today.

Levene's allegations that Pintail failed adequately of illuminate his path and did not provide him with a safe place to work are best characterized as acts of the employer. We agree with the district court that Pintail is immune from suit for these acts. Under Jones & Laughlin, however, Pintail may be liable for negligence in its capacity as a vessel owner. We turn next to the question whether, in this capacity, Pintail breached any duty it owed to Levene.

B. Vessel Negligence

[6] Levene next argues that Pintail as a vessel owner breached a duty it owed him even though he was not injured by a dangerous condition of the SUTTON. The district court held that the duties owed Levene were those set forth in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 456, 101 S.Ct. 1614, 68 L.Ed.2d 1(1981), and determined that Pintail committed no vessel negligence under that Scindia test. Levene contends that the district court erred because Scindia does not define the full scope of a vessel owner's duties when an employee is not injured on the owner's vessel.

[7] Congress in § 905(b) replaced the unseaworthiness cause of action against a vessel with liability based on negligence, bur gave no indication of what acts would constitute negligence. Scindia constituted the Supreme Court's effort to create substantive standards of negligence. See Castorina, 758 F.2d at 1032. In Scindia, the Court held that a vessel owner has three broad duties to a longshoreman engaged in stevedoring operations. Before operations begin, the owner must exercise "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety. . . ." Scindia, 451 U.S. at 167, 101

S.Ct. at 1622. The owner at this time also must warn the stevedore of hidden dangers that could not be discovered by the exercise of ordinary care. Ida.; Theriot v. Bay Drilling Corp., 783 F.2d 527, 535 (5th Cir.1986) Once stevedoring operations have begun, the owner has no duty to supervise or inspect the work and must only take care to prevent unreasonable hazards. Scindia, 451 U.S. at 172, 101 S.Ct. at 1624; Futo v. Lykes Bros. S.S. Co., 172 F.2d 209, 213 (5th Cir.1984). There is an exception to this limited liability after operations have begun. The vessel owner must intervene with respect to obvious dangers if it acquires actual knowledge that a condition of the vessel or its equipment poses an unreasonable risk of harm and if the vessel owner acquires knowledge that the stevedore is not exercising reasonable care to protect its employees. Scindia, 451 U.S. at 175-76, 101 S.Ct. at 1626; Lormand b. Superior Oil Co., 845 F.2d 536, 542 (5th Cir.1987), cert. denied, 484 U.S. 1031, 108 S.Ct.739, 98 L.Ed.2d 774(1988).[6]

We have held that although Scindia arose in the context of stevedoring operations, the duties it enumerates are not limited to stevedores. In Lormand, we found that Scindia defined the duties owed to the LHWCA-covered employee of an independent contractor working aboard a jack-up vessel. Lormand, 845 F.2d at 541-42; see also Hill v. Texaco, Inc., 674 F.2d 447, 451 (5th Cir.1982). Similarly, in Teply we

6. Consequently, we have recognized three exceptions to the general rule of nonliability once operations have begun.
Vessel owner liability may arise:
1. [if the vessel owner fails] to warn on turning over the ship of hidden defects of which he should have known [Exception 1]
2. for injury caused by hazards under the control of the ship [Exception 2]
3. [if the vessel owner fails] to intervene in the stevedore's operations when he has actual knowledge both of the hazard and that the stevedore, in the exercise of "obviously improvident" judgement, means to work on in the face of it and therefore cannot be relied on to remedy it. [Exception 3]

Masinter, 867 F.2d at 896-97 (citing Turner v. Costa Line Cargo Services, Inc., 744 F.2d 505, 512 (5th Cir.1984) (Gee, J. dissenting)).

stated that in Scindia "[t]he Supreme Court interpreted § 905(b) as it applies to stevedores, but in principle as it applies to other harborworkers who work on board vessels as well." Teply, 859 F.2d at 377. As noted earlier, we have held that Scindia defines the duties owed to an injured worker by a vessel owner acting in a dual capacity as employer. Castorina, 758 F.2d at 1033. Thus, we believe, as did the district court, that Scindia governs Levene's § 905(b) action against Pintail for vessel negligence.[7]

[8] The district court determined that Pintail had not breached its duties under Scindia because Pintail "satisfied its obligation to provide its employees with a safe ship." The court likened Pintail's action in turning over the tug after inspecting it and finding no hidden hazards to a shipowner turning over a ship to a stevedore. Once the line-handling operation began, Pintail was under no duty to supervise the work, especially where it took place on another ship. The court also held that Pintail did not breach its duty under Scindia to intervene because "[t]he scope of this duty is limited to the confines of a stevedoring operation, which typically encompasses the work area on the vessel to which the stevedore is assigned." While we disagree with the district court's characterization of any Scindia duty as applying only to stevedoring operations, we may affirm the judgment even though a method of reasoning that we would not

7. Levene argues that, because Pintail was a Jones Act employer with respect to Captain Hebert and Kevin Warner, and because both Levene and Warner were performing the traditional duties of seamen on the night of the accident, Pintail should be held to a "Jones Act-like" standard of care in this case. We have held, however, that a worker "does not cease to be covered by the [LHWCA] merely because at the moment of injury he is not performing his usual duties." Reynolds v. Ingalls Shipbuilding Division, 788 F.2d 264, 271 n. 8 (5th Cir.), cert. denied, 479 U.S. 885, 107 S.Ct. 278, 93 L.Ed.2d 253 (1986). Jones Act duties apply only when a worker meets the test of seamen status in Barrett v. Chevron U.S.A., 781 F.2d 1067 (5th Cir.1986) (en banc); Levene concedes that he is covered by the LHWCA, not the Jones Act, and we therefore decline to apply any standards to Pintail other than those mandated by the LHWCA.

adopt. Masinter of Texas System Police, 792 F.2d 1360, 1362 n. 3 (5th Cir.1986), cert. denied, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987).

Levene essentially argues that, because he was performing non-stevedoring operations on a separate barge, Pintail's duties extended beyond the Scindia duties of ensuring the safety of the SUTTON, preventing unreasonable hazards once the operation began, and intervening with respect to obvious dangers. He asks us to fashion a standard of care in which a vessel owner such as Pintail must protect him from unreasonably dangerous conditions on any vessel he happens to board while carrying out his duties for his employer-vessel owner. We think such a rule is foreclosed by the Supreme Court's decision in Scindia and our cases recognizing that Scindia alone supplies the substantive negligence standards in an action under § 905(b). We cannot find in Scindia any mandate for extending the duty of a shipowner to protection against hazards on another ship. The very notion under the dual capacity doctrine of holding one single entity liable for the negligence of "the vessel" but not for the negligence of "the employer" serves to limit liability to those acts taken in connection with the owned vessel itself. Absent alteration by the Supreme Court of the fairly detailed duties it has interpreted § 905(b) as imposing, we decline to fashion a general standard of "reasonable care" that would require a shipowner to protect against hazards under control of the ship (which we consider a narrow exception and discuss below), we do not think Scindia imposes any duty on a shipowner to protect against hazards arising on a separate ship.

Levene cites Pichoff v. Bisso Towboat Co., 748 F.2d 300 (5th Cir,1984), and Richendollar v. Diamond M Drilling Co., 784 F.2d 580 (5th Cir.1986), for the proposition that some standard other than Scindia applies.[8] Pichoff involved the

8. We do not address Levene's citation to Richendollar, as the panel's finding of § 905(b) vessel negligence was overturned by this court sitting en banc. Richendollar v. Diamond M. Drilling Co., 819 F.2d 124 (5th Cir.), cert. denied, 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987).

negligence of the defendant's general manager in giving a worker an inadequate flashlight rather than a drop light so that the worker could inspect the vessel's fuel tanks, and in ordering him to perform his work hurriedly so that the company would not lose money. The court found that only the order to hurry the work constituted vessel negligence, because this order forced the employee to work under dangerous conditions on the vessel itself. The court did not discuss Scindia in determining what acts of the owner-employer could have constituted negligence, but we think our later decision in Castorina does not leave any room for the broad-based duty Levene urges.

[9] It is true that Pintail may be held liable for injury caused by hazards under control of the tug. In Helaire v. Mobil Oil Co., 709 F.2d 1031 (5th Cir.1983), we stated that "the owner has a duty to avoid exposing longshoremen to harm 'from hazards under the act or control of the vessel.' " Id. at 1036 (citing Scindia, 451 U.S. at 167, 101 S.Ct. at 1622); see also Masinter, 867 F.2d at 897. However, we do not view the fleeting contact between Pintail and the BB-242 as the kind of control that could result in a finding of liability. We faced a similar situation in Ducote v. International Operating Co. of La., inc., 678 F.2d 543 (5th Cir. 1982). In that case, an employee injured while preparing a barge for cleaning sued both the actual owner of the barge and the company temporarily operating it while it was in for cleaning. Like Levene, Ducote argued that the temporary operator was its owner pro hac vice, and thus liable to him under the LHWCA. We rejected this attempt to characterize a limited contact as "control" for the purposes of Scindia duties, and held that "although [the cleaning company's] tug did move the barge upon which the accident occurred, this movement 'was in connection with its obligation to the owner for cleaning and loading of the vessel. Those incidental operations certainly do not make [the cleaning company] the owner pro hac vice.'" Ducote, 678 F.2d at 545.

The cases in which we have found such control by the vessel owner as to impose a duty generally have involved dangerous conditions on the owned vessel itself. In Masinter,

we found that the vessel owner's crew was "solely responsible" for placing a stairway which resulted in injury to an independent contractor aboard the vessel. This level of control placed the owner under "a continuing duty of care to those aboard the vessel." 867 F.2d at 897. In Theriot, we found that the owner of a drilling barge controlled a concentration of drilling mud in the work area, on which an independent contractor slipped and fell. 783 F.2d at 535.[9] Levene, by contrast, asks us to deem Pintail in control of the BB-242, and thus to impose a duty to protect against unreasonably dangerous conditions. In light of the fact that Pintail had contact with the BB-242 for only a short time and only by chance as part of an operation to free another barge, we cannot do so.

We reach the same result as in Ducote today. Although Captain Herbert temporarily was in "command" of both the SUTTON and the BB-242, this did not give Pintail constructive control over the work area of the barge and did not give rise to the degree of control we think Scindia requires before liability can attach. There was no evidence that Pintail had any responsibility for the condition of the deck of the BB-242. Pintail therefore was under no duty to make any inspection or use ordinary care to ensure that the BB-242 was free of unreasonable hazards.

The district court found, from the testimony of Captain Hebert, that the SUTTON had been inspected and was deemed to be a safe vessel prior to the commencement of the day's operations. Furthermore, the court found that nothing changed the condition of the SUTTON before Pintail's employees engaged in the linehandling operation. The accident occurred not as the result of any defect in the SUTTON, but at best was the result of a series of employment decisions. All the missteps Levene cites, from the decision to continue working despite the adverse weather conditions to the placement of the spotlight in the middle of the BB-242 must be

9. See also Turner v. Costa Line Cargo Services, Inc., 744 F.2d 505, 508-09 (5th Cir.1984); Walker v. Blacksea S.S. Co., 637 F.2d 287, 292-93 (5th Cir. 1981).

classified as potential acts of employer negligence. not vessel negligence.[10] The district court's findings concerning Pintail's lack of negligence in its capacity as vessel owner are essentially factual in nature, and must be upheld unless clearly erroneous. Lormand, 845 F.2d at 543 & n. 9. We do not find them to be such.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgement of the district court.

10. Of course, we express no opinion on whether these acts actually were negligent, as employer negligence is irrelevant under the LHWCA. The important point here is that these were acts of the employer, and are not the kind of acts that can be classified as vessel negligence.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

LESTER LEVENE, et al.

CIVIL ACTION NO. 87-0104

-vs-

SECTION "O" (JUDGE LITTLE)

PINTAIL ENTERPRISES, Inc.,
et al.

OPINION

This action arises out of an accident in which Lester Levene, an employee of Pintail Enterprises, Inc. ("Pintail"), was injured when he slipped and fell while attempting to cross a barge during a line-handling operation. Levene and his wife brought suit against Pintail, owner of the tugboat known as the M/V SUTTON, and Broussard Brothers, Inc. ("Broussard"), owner and operator of the barges known as BB-242 and BB-243. Subsequently, Scottsdale Insurance Company and Certain Underwriters at Lloyd's of London were added as defendants. A bench trial was conducted on 20 November 1989. After consideration of the pleadings, testimony, and evidence, the court makes these findings of fact and conclusions of law.

Findings of Fact

On 7 February 1986, Lester Levene, an employee of Pintail, injured his knee when he slipped on the deck of a barge. At the time of the accident, Levene was assisting Kevin Warner, a co-employee, complete a line-handling operation on the barge. Although Levene was employed primarily as a heavy equipment operator, he also engaged in roustabout activities and cement work when Pintail needed his assistance.

On the morning of the accident, Preston Hebert, a Pintail employee, inspected the M/V SUTTON, a vessel chartered and operated by Pintail. The inspection revealed that the SUTTON was staunch and fit for its intended voyage. Shortly thereafter, Hebert, who was also captain of the SUTTON, Levene and Warner boarded the SUTTON enroute to the Inexco drilling site to perform their daily work.

After these Pintail employees discharged their duties at the Inexco field, Hebert was instructed to proceed to Broussard Brothers, a barge facility in Intracoastal City, Louisiana, to pick up another barge for the next day's work.

While the SUTTON made its way to Broussard Brothers, night fell and it started raining. Upon arriving at Broussard Brothers, Hebert, Warner and Levene commenced their search for a barge known as the BB-243. At this time, the rain was steady, the wind was blowing, and there was thunder and lightning.

To facilitate the search by illumination of the area, Captain Hebert used one of the SUTTON's spotlights. Although there were two spotlights aboard the SUTTON, only one of these spotlights was operational. The main purpose for using the spotlight was to assist Levene and Warner in finding the BB-243. Hebert operated the spotlight from the wheelhouse. The Pintail employees found the BB-243 situated behind the BB-242 and beyond the SUTTON's reach. The BB-242 and BB-243, both approximately 120 feet high in length and 30 feet in width, were flatbed barges, with their decks sitting three feet above the water line.

To obtain control over the BB-243, it was necessary to untie the BB-242 and move it out of the way. To accomplish

this, Captain Hebert positioned the SUTTON's bow against the broad side of the BB-242 so that the vessel was perpendicular to the barge. Warner and Levene were then instructed to go to the mooring bits on opposite ends of the BB-242 and untie the lines in order to release the BB-242 from the BB-243. Hebert aimed the spotlight directly down the middle of the BB-242 to assist Levene and Warner in the line-handling operation. Due to the positioning of the barge and vessel, lighting was adequate in the middle, but dim on the extreme right and left ends of the barge.

Despite the continuing rain and poor visibility, the Pintail employees proceeded with the line-handling operation. Levene and Warner could see a variety of objects, including oilfield equipment and scrap material on the deck of the BB-242. Levene left the SUTTON intending to reach the mooring bit in the far right corner of the barge. However, he was forced to walk toward the rear right corner of the BB-242 because several obstructions on the barge prevented him from proceeding directly to his intended destination. After finding a clear route, Levene changed his course and walked directly toward the far right mooring bit. Levene chose this route despite the presence of scrap material and grease in his path. Half way to the mooring bit, Levene slipped and fell to the deck of the barge injuring his knee. Despite this injury, Levene untied the mooring lines, returned to the SUTTON, and told Captain Hebert about the accident. Two days later, Levene reported the accident to Pintail.

Conclusions of Law

This action has been brought under the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. ("LHWCA" or "Act"). Accordingly, this court has jurisdiction pursuant to 28 U.S.C. § 1331.

To recover under LHWCA, a person must be engaged in "maritime employment" and injured on a "maritime situs." 33 U.S.C. § 903; Northeast Marine Terminal v. Caputo, 432 U.S. 249, 265, 279 (1977). A literal reading of the Act indicates it is applicable to traditional "longshoreman" and

"harbor workers" engaged in maritime employment. See 33 U.S.C. § 902(3). The Fifth Circuit has held that the LHWCA umbrella covers independent contractors and their harbor worker employees while working aboard vessel. Hill v. Texaco, 674 F.2d 447, 451 (5th Cir. 1982).

Under LHWCA, an injured worker is entitled to recover compensation benefits from his employer. 33 U.S.C. § 904. The LHWCA also permits an injured worker to bring a separate action against the vessel owner for vessel negligence. 33U.S.C. § 905(b). Typically, an injured longshoreman or harbor worker recovers compensation against his employer, and then brings a separate action for negligence against a separate vessel owner. Occasionally however, a LHWCA employer conducting stevedoring or other maritime related operations is also the vessel owner. Under such circumstances, an injured worked may bring suit against his employer "qua vessel" under 33 U.S.C. § 905(b) for injuries arising out of the vessel's negligence. Taylor v. Bunge Corp., 845 F.2d 1323, 1327-28 (5th Cir. 1988); White v. Cooper/T. Smith Corp., 690 F. Supp. 534, 538 (E.D. La. 1988). thus, a LHWCA employer who acts in such a dual capacity can only be held liable for negligence in its capacity as the vessel owner. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 531 n. 6 (1983); Kerr-McGee v. Ma-Ju Marine Services, Inc., 830 F.2d 1332, 1339 (5th Cir.), reh'g denied, 835 F.2d 288 (5th Cir. 1987); Tran v. Manitowoc Engineering Co., 767 F.2d 223, 226 (5th Cir. 1985). The employer retains statutory immunity for any negligence it commits in its role as the injured worker's employer. 33 U.S.C. § 905(a); Castorina v. Lykes Bros. S.S. Co., Inc., 758 F.2d 1025, 1033 (5th Cir.), cert. denied, 474 U.S. 846 (1985).

Levene asserts that Pintail has vessel negligence for (1) failing to illuminate properly the work area on the BB-242, (2) failing to clear a path on the barge or warn Levene about the hazardous condition on the barge, (3) creating a hazardous condition on the barge, and (4) forcing Levene to work in bad weather, causing him to perform hastily his duties in an uncareful manner. On the other hand, Pintail contends that it is statutorily immune from suit under LHWCA for any acts of negligence committed in its capacity as Levene's em-

ployer. Under 33 U.S.C. § 904, a longshoreman or harbor worker who suffers an injury that arises out of his employment is entitled to recover compensation from his employer regardless of whether the injury was caused by the employer's negligence. Jones & Laughlin Steel, 462 U.S. at 528-529; See also Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046, 1050 (5th Cir. 1983) (quoting Voris v. Texas Employers Insurance Association, 190 F.2d 929, 934 (5th Cir.), cert. denied, 342 U.S. 932 (1951)). Any liability incurred by an employer under 33 U.S.C. § 904 "shall be exclusive and in place of all other liability of such employer to the employee..." 33U.S.C. § 905(a).

In the case at bar, Levene was a Pintail employee injured while discharging his duties for Pintail. Clearly, Levene's injury occurred in the course of his employment. Therefore, Pintail, as Levene's employer, is only liable for LHWCA compensation and is statutorily immune from liability for the acts of negligence alleged by the plaintiff.

More importantly, Pintail contends that it cannot be held liable as owner of the SUTTON for Levene's injuries because none of the alleged acts constitutes vessel negligence. The Fifth Circuit has held that the duties owed by a shipowner to a longshoreman under 33 U.S.C. § 905(b) are those set forth by the United States Supreme Court in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981). Castorina v. Lykes Bros. S.S. Co., Inc., 758 F.2d 1025, 1033 (5th Cir. 1985). Under Scindia, a vessel owner has a duty to furnish a safe vessel and to warn a stevedore about any concealed defects in the ship's equipment or stevedore's work area reasonably known to the owner. Id. at 167. Furthermore, the shipowner has no general duty to supervise a stevedore or inspect the vessel after stevedoring operations are in progress unless a law, custom, or contractual provision to the contrary exists. Id. at 172. A vessel owner has a duty intervene if it learns that a dangerous condition arose in the stevedoring risk of harm due to the stevedore's "obviously improvident" actions. Id. at 175. Under this last duty, a shipowner can be held liable only if it had actual knowledge of both the dangerous condition and the stevedore's unreasonable actions in dealing with the danger. Helaire v. Mobil

Oil Co., 709 F.2d 1031, 1038-39 (5th Cir. 1983).

Pintail asserts that it did not breach its Scindia duties, and cannot be held liable for negligence under 33 U.S.C. § 905(b). First, Captain Hebert testified at trial that he inspected the M/V SUTTON before the Pintail crew embarked on its mission to the Inexco drilling site. Hebert ensured that hand lanterns were available to Pintail's employees and that at least one of the SUTTON's two spotlights was operational. Overall, Captain Hebert's inspection revealed that the SUTTON was a safe vessel on the day Levene was injured. Nothing in the record indicates that the SUTTON's condition changed while in operation prior to the time it was turned over to Pintail's employees at the Broussard Brother's facility. Therefore, this court concludes that Pintail, as owner of the SUTTON, satisfied its obligation provide its employees with a safe ship. In addition, since there were no hidden hazards aboard the SUTTON about which Pintail had actual or constructive knowledge, Pintail did not breach its duty to warn its employees of such danger.

Pintail turned the SUTTON over to its own employees, just as a shipowner turns its vessel over to a stevedore, when the SUTTON arrived at the Broussard Brothers facility and the line-handling operation commenced. Captain Hebert, Warner, and Levene began the line-handling operation in inclement weather after locating the BB-243 and positioning the SUTTON next to the BB-242. Pintail, as vessel owner, correctly relied upon its employees to perform the line-handling operation and had no duty to supervise their work or inspect the SUTTON after the line-handling operation commenced. This conclusion is buttressed by the fact that the line-handling operation was performed almost exclusively on the BB-242 and not on the SUTTON.

Pintail also did not breach its limited duty under Scindia to intervene. The scope of this duty is limited to the confines of a stevedoring operation, which typically encompasses the work area on the vessel to which the stevedore is assigned. In the instant condition and provided adequate lighting throughout the job. The deck of the SUTTON appeared to be safe enough for Levene and Warner to proceed toward the BB-242. Clearly, the actions of Pintail's employees on the

SUTTON, including Hebert's operation of the spotlight, were not so obviously improvident as to present an unreasonable risk of harm to the employees during the line-handling operation. Furthermore, the fact that Levene's injury occurred on the BB-242, and not on the SUTTON, supports the conclusion that no duty to intervene arose.

This court holds that Pintail, as owner of the M/V SUTTON, did not breach any of the duties dictated by Scindia. Therefore, Pintail is completely exonerated from liability under 33 U.S.C. § 905(b). We also find no liability on the part of Broussard Brothers, Inc. No negligence has been proved that the mere parking of a barge whose oily decks supported used oilfield equipment is a negligent activity by Broussard Brothers.

Accordingly, Levene's complaint against Pintail is DISMISSED.

An appropriate judgement will issue.

Alexandria, Louisiana.

8 February 1990.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

LESTER LEVENE, et al.

CIVIL ACTION NO. 87-0104

—vs—

SECTION "O" (JUDGE LITTLE)

PINTAIL ENTERPRISES, Inc.,
et al.

JUDGMENT

For written reasons assigned this date, the plaintiffs' claims against all defendants are DISMISSED with prejudice.

Alexandria, Louisiana.
8 February 1990.

F. A. LITTLE, JR..
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 21st day of January, 1992.

JOHN E. McELLIGOTT, JR.

JAMES C. LOPEZ